**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **GORDON D. BYLER**<br>Claimant | ) | |
| VS. | ) | |
| **AGCO CORPORATION**<br>Respondent | ) | Docket No. 1,023,480 |
| AND | ) | |
| **AMERICAN ZURICH INSURANCE CO.**[1]<br>Insurance Carrier | ) | |

# ORDER

## STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the October 31, 2008, Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on February 20, 2009. E. Lee Kinch, of Wichita, Kansas, appeared for claimant. Larry Shoaf, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was permanently totally disabled as the result of an accident that arose out of and in the course of his employment with respondent.

The Board has considered the record and adopted the stipulations listed in the Award.

[1] Counsel for respondent announced at the regular hearing and to the Board that respondent was self insured on the date of accident. The records of the Division of Workers Compensation, however, show American Zurich Insurance Company to be respondent's insurance carrier from October 12, 2001, to the present.

## ISSUES

Respondent requests review of the ALJ's finding that claimant is permanently totally disabled. Respondent argues that claimant did not make an effort to obtain work of any type. Further, respondent asserts that the opinions of the three testifying physicians do not carry the claimant's burden of proof that he is incapable of substantial, gainful employment or is realistically unemployable.

Claimant requests that the Board affirm the ALJ's finding that he is permanently totally disabled.

The issue for the Board's review is: Is claimant permanently totally disabled as a result of his work-related accident of October 15, 2004?

## FINDINGS OF FACT

At the time of the regular hearing, claimant was 55 years old. He began working for respondent in April 1995 as a fabricator. On October 15, 2004, claimant was injured when a load of steel fell on him, causing fractures of his right leg above the ankle. Dr. Charles Craig performed surgery two days later, and a titanium rod and three screws were placed in claimant's right leg. Claimant testified that along with the fractures in his right leg, he experienced low back pain as a result of the accident. He complained to Dr. Craig of low back pain on November 1, 2004, at his first office visit after being released from the hospital. Claimant admitted that he had suffered injuries to his low back when he was in high school but testified that his condition had resolved and he had no permanent restrictions as a result of those previous injuries. Claimant also had right shoulder complaints, which Dr. Craig treated with physical therapy, and those symptoms eventually resolved.

Dr. Craig, a board certified orthopedic surgeon, treated claimant from his admission to the hospital on the date of the accident until April 2006. As his leg healed, he was sent to physical therapy. By January 2005, claimant was walking with a cane. On June 3, 2005, Dr. Craig again performed surgery on claimant, removing the three screws that had been inserted in his tibia but leaving the titanium rod in his leg. A few days later, Dr. Craig ordered an MRI of claimant's lumbar spine. The MRI showed that claimant had foraminal narrowing at L2-3 on the left and bilaterally at L3-4, which was aggravated or accentuated by retrolisthesis. Dr. Craig opined that claimant's back problems were related to the injury he sustained in high school and that the preexisting injury had been aggravated by his work injury. Dr. Craig recommended claimant be seen by a back specialist, and respondent authorized Dr. John Dickerson to examine and treat claimant for his back problems.

As of April 2006, claimant still had pain and swelling in his right ankle. Dr. Craig believed that claimant may be developing some traumatic arthritis. There was also some discussion of another surgery to remove the rod from claimant's leg. By that time, claimant

was scheduled for surgery on his back, and Dr. Craig was to see him at some point after that surgery. However, Dr. Craig did not see claimant again until May 7, 2008, when he saw him at the request of claimant's attorney for an up-to-date evaluation and rating opinion. At that time, claimant's chief complaint was low back and right leg pain. He suffered from weather sensitivity at the site of the original scar and screw sites. He complained that his right foot and ankle swell, and he had cramping in his right leg. He continued to use a cane for long walks. Dr. Craig diagnosed claimant with a well-healed fracture of the right tibia with residual pain, right ankle pan, and swelling. He continued to believe that claimant might be developing traumatic arthritis in his right ankle.

Using the AMA *Guides*,[2] Dr. Craig rated claimant as having a 16 percent impairment of the foot, which computes to an 11 percent impairment to the lower extremity and a 5 percent impairment of the whole person. Concerning future medical treatment, Dr. Craig said that removal of the rod in claimant's leg should be considered. If claimant developed traumatic arthritis in the ankle, treatment might involve fusion or replacement in the future. Dr. Craig and claimant did not discuss specific restrictions, but Dr. Craig said that claimant is obviously limited in how far he can walk and what he can carry. Dr. Craig recommended that claimant not walk regularly on any extended basis for more than one to two blocks. He should not be on his leg more than 20 or 30 minutes without rest. He did not know what claimant's restrictions were for his back, but he would keep his lifting fairly light, 10 or 15 pounds at the most. Claimant should not climb ladders. When asked about claimant's capacity to become employed, Dr. Craig stated: "I think that any job requiring any significant labor or factory work, things like that, I don't think he is employable doing those particular occupations."[3]

Dr. John Dickerson, a neurosurgeon, first saw claimant on July 28, 2005. Claimant complained of low back pain. He was not complaining that he had pain radiating into his legs. Claimant told Dr. Dickerson that he had been experiencing low back pain since the time of the work injury. Dr. Dickerson diagnosed claimant with severe retrolisthesis at L3-4 with spinal stenosis. He discussed with claimant conservative therapy, including injection therapy. He also prescribed a muscle relaxer.

Dr. Dickerson next saw claimant on February 13, 2006. His pain had gone from only low back pain to radiating pain into the right leg. He recommended that claimant undergo epidural steroid injections targeted to take the swelling out of the nerve root. Also, since claimant had new symptoms, he ordered another MRI. He continued to keep claimant off work because it seemed like his condition was progressing. An MRI was performed on March 14, 2006, which showed the same situation as the previous MRI. But claimant now

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[3] Craig Depo. at 33.

had new symptoms showing some kind of nerve root compression. Because of claimant's new symptoms, he recommended surgery when he next saw claimant on April 17, 2006.

On July 26, 2006, Dr. Dickerson performed complete bilateral laminectomies of L3, L4 and L5 with instrumented fusion at L3-4 and L4-5, after which he prescribed physical therapy. Dr. Dickerson continued to treat claimant. On July 12, 2007, claimant was still using a cane and had significant weakness. At that time, Dr. Dickerson gave him a 5-pound lifting restriction.

Dr. Dickerson opined that claimant's work accident of October 15, 2004, caused or contributed to his current pathology. As of the last time he saw claimant, he believed that claimant was unemployable. In coming to this opinion, he factored in that claimant had worked manual labor most of his life. He said that if claimant could work, it would have to be sedentary with no lifting. It would also have to be a job that would allow him to change positions frequently. He said claimant's 5-pound lifting restriction would be a permanent restriction.

Dr. Paul Stein, a board certified neurosurgeon, examined claimant twice, both times at the request of respondent. He first saw claimant on June 9, 2006. He was asked by respondent to provide an opinion concerning diagnosis, causation, surgery, and treatment options. Claimant's primary complaint was low back pain. He told Dr. Stein that he started having low back pain from the beginning after the accident. After examining claimant, Dr. Stein opined that surgery at the L3-4 level would be a reasonable consideration. He diagnosed claimant with degenerative disease at L3-4 with irritation of the nerve root and believed claimant's symptomatology was the result of aggravation by his work incident of October 15, 2004.

Dr. Stein next saw claimant on September 20, 2007. Since he had last seen claimant, Dr. Dickerson had performed surgery that included a fusion from the third lumbar down to the fifth lumbar. Claimant had not returned to work. Claimant told Dr. Stein that the surgery was helpful in terms of constant sharp pain, but he still had aching in the low back, more on the right. He also had occasional pain in the right anterior thigh. If he walked for long distances, he would start to limp and have increased back pain. He used a cane for long walks. He did not have numbness or tingling.

After examining claimant, Dr. Stein again opined that claimant had suffered an aggravation of preexisting degenerative disk disease to the lower back at L3-4 with radiculopathy on the right. He had undergone surgery with some improvement but still had symptomatology. Dr. Stein believed claimant was at maximum medical improvement, although the x-rays did not show a solid fusion. He rated claimant as having a 25 percent whole person impairment under DRE Category V of the AMA *Guides*.

Dr. Stein gave claimant permanent restrictions of no lifting more than 20 pounds with any single lift up to twice a day, 10 pounds occasionally and 5 pounds frequently but

not continuously. He should avoid lifting from below knuckle height or above chest height. He should avoid repetitive bending and twisting of the lower back. He should alternate sitting with standing and walking as needed. However, Dr. Stein further stated that claimant should be capable of work activity with restrictions.

Dr. Stein reviewed a task list prepared by Douglas Lindahl. Of the 15 tasks on that list, Dr. Stein opined that claimant was unable to perform 9 for a task loss of 60 percent. Dr. Stein also reviewed a task loss list prepared by Dan Zumalt. Of the 28 non-duplicative tasks on that list, Dr. Stein opined that claimant is unable to perform 6, for a 21.4 percent task loss.[4]

Dr. Stein reviewed a six-minute DVD taken at the request of respondent that showed claimant walking without a cane, bending to get into a car, holding some collapsed cardboard boxes, and bending over at the waist to pick up the collapsed boxes. He acknowledged, after reviewing the DVD, that claimant was not "breaking any speed records when he walked."[5] After reviewing the DVD, he would not change his recommendations regarding restrictions.

Doug Lindahl, a vocational rehabilitation counselor, met with claimant on November 8, 2007, at the request of claimant's attorney. He prepared a list of 15 tasks claimant had performed in the 15-year period before his work related accident of October 15, 2004.

Mr. Lindahl testified that because claimant has a limitation of alternating sitting, standing and walking, he would be limited to part-time work and would be unable to return to the type of work he had performed in the 15-year period before his injury. He did not think claimant would be competitive in trying to find a sedentary job because of his restriction to alternate sitting, standing and walking. As of the time of the interview, claimant was receiving Social Security disability benefits, was unemployed, and had a 100 percent wage loss.

Dan Zumalt, a vocational rehabilitation consultant, met with claimant on April 16, 2008, at the request of respondent. He prepared a list of 28 tasks that claimant had performed in the 15-year period before his injury. At the time of the interview, claimant had been adjudicated by Social Security as being totally disabled. He had not made an attempt to seek employment.

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[4] The ALJ's Award sets out that Dr. Stein opined that claimant lost the ability to perform 6 tasks for a task loss of 28 percent. However, there were 28 tasks, and a loss of the ability to perform 6 computes to a task loss of 21.4 percent.

[5] Stein Depo. at 30.

At the time of the interview, claimant was 55 years old. He had graduated from high school and had been in the United State Air Force, where he was in security. He had some on-the-job training. Mr. Zumalt found claimant to be fairly articulate. He had good communication skills. Mr. Zumalt testified that given the work restrictions set forth by Dr. Dickerson, Dr. Craig, and Dr. Stein, claimant is capable of substantial, gainful employment. However, Mr. Zumalt said he believed that Dr. Dickerson's 5-pound weight restriction for claimant was a temporary restriction.

Mr. Zumalt opined that claimant is capable of earning up to $12.84 per hour working as a surveillance system monitor. Using an average weekly wage of $923.07, he computed claimant's wage loss to be 44 percent. That average weekly wage, however, did not include fringe benefits, and he agreed that if fringe benefits were included, claimant's wage loss would be higher.[6]

William Altum is employed by respondent as a supervisor in the fabrication department. He is familiar with claimant and claimant's job duties with respondent. Mr. Altum was provided Dan Zumalt's task list and was asked to look it over and see if it accurately described the type of work claimant did as a fabrication machine operator. Mr. Altum looked over the list and said that the list accurately reflected the kind of individual tasks that claimant performed while he was a fabricator with respondent.

## PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[7] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[8] An injury is not compensable, however, where the worsening

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[6] Claimant's stipulated preinjury average weekly wage was $927.17 without fringe benefits. Fringe benefits terminated on October 15, 2005, and after that date claimant's average weekly wage was $1,116.46.

[7] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[8] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[9]

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[10]

In *Wardlow*[11], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The court in *Wardlow* looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

## ANALYSIS

The ALJ determined claimant was permanently and totally disabled as a result of the October 15, 2004, accident.

> In the case at bar, Claimant has very little formal training, and no identified transferable job skills. He is now 56 years old, with a bad back, a bad leg, and significant restrictions that preclude performing anything more than sedentary work.

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[9] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[10] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[11] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

> He cannot return to the production work he has performed most of his working life. While Respondent, through Mr. Zumalt, has identified a *theoretical* area in which Claimant *might* be able to find employment, no labor market survey was undertaken to determine whether there were any *actual* employment opportunities in that field available to Claimant. Further, Respondent did not provide any placement services to Claimant to enable him to secure alternative employment. Neither vocational consultant recommended either additional education for formal retraining to allow him to reenter the job market.
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> Conclusion
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> Claimant suffered compensable injuries when he was struck by falling sheets of heavy metal. He's undergone two surgeries on his right leg and one on his back. He is saddled with significant permanent work restrictions that preclude his return to the manufacturing work he has performed throughout most of his vocational life. At age 56, he has limited education and no transferable job skills. He has sustained his burden of proof that he is permanently and totally disabled within the meaning of the Act.[12]

Claimant continues to have pain in his leg, especially around the ankle. He testified that he cannot walk more than 200 or 300 feet before his leg really begins to hurt. Dr. Craig recommended claimant not walk on any extended basis for more than one to two blocks. He also recommended claimant not be on his leg for more than 20 or 30 minutes without rest. Claimant testified that his back continues to be stiff and sore. Dr. Craig likewise recommended claimant avoid lifting over 10 or 15 pounds. Dr. Dickerson gave claimant a 5-pound lifting restriction. Dr. Stein's lifting restrictions permitted a little more weight, but he further limited claimant from lifting from below knuckle height and above chest height. All three physicians recommended claimant alternate sitting, standing and walking. Mr. Lindahl said that this restriction would make even sedentary employment difficult to perform. He considered claimant to be realistically unemployable. Mr. Zumalt disagreed and suggested claimant was employable in a sedentary position such as a surveillance systems monitor. However, he did not know whether such a position was available within the four-county area job market in an around Wichita.[13] It is also not clear that such a job would fit claimant's inability to sit for prolonged periods of time or even for 20 minutes at a time. Mr. Zumalt acknowledged that he did not meet with claimant for the purposes of job placement or vocational counseling. Rather, he interviewed claimant primarily for the purpose of performing a job task analysis, which included developing a 15-

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[12] ALJ Award (Oct. 31, 2008) at 7-8.

[13] Claimant did not reside in Wichita or Sedgwick County, but rather in Newton, Harvey County. Furthermore, his accident occurred in Hesston, which is likewise in Harvey County. The four counties included in the Wichita labor survey are Sedgwick, Harvey, Butler and Cowley Counties.

year work history and a job task list.[14] At the time of the regular hearing, claimant was continuing to take prescription medications, including a muscle relaxer and an anti-inflammatory. Claimant does not believe that he is capable of working a full time job. The Board agrees.

## CONCLUSION

Claimant is permanently totally disabled as a direct result of his October 15, 2004, work-related accident with respondent.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated October 31, 2008, is affirmed.

**IT IS SO ORDERED.**

Dated this _____ day of February, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: E. Lee Kinch, Attorney for Claimant
Larry Shoaf, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

[14] Zumalt Depo. at 16-17.